STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 1999
v	No. 207453 Detroit Recorder's Court
MARTEZ RAMON DURANT, Defendant-Appellant.	LC No. 96-004768

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a; MSA 28.797(a), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of four to ten years' imprisonment for the carjacking and armed robbery convictions, consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that his convictions are not supported by sufficient evidence and contravene the great weight of the evidence. Defendant only contests the sufficiency and credibility of the evidence as it relates to his identity as the perpetrator. In reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A jury verdict is against the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if a new trial were not granted. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

In the present case, the victim positively identified defendant both at a lineup and at trial as the man who threatened him with a gun and as one of the two men who stole his car. In addition, two police officers testified that they arrested defendant shortly after the incident only a block from where the car was found; that he matched the description given by the victim; and, that he told one officer that another individual had "also" been involved in the carjacking. Viewed in a light most favorable to the

prosecution, this evidence was sufficient to establish defendant's identity as the perpetrator. Although the credibility of this testimony was hindered by certain inconsistencies and uncertainties, such credibility determinations are the exclusive province of the jury and must stand even if the trial court would have reached a different conclusion. *Lemmon, supra* at 646-647. Therefore, after carefully reviewing the record, we find that the jury's verdict was supported by sufficient evidence and that the trial court did not abuse its discretion in concluding that the verdict did not contravene the great weight of the evidence.

Defendant next contends that the trial court erred in failing to grant a new trial on the basis of a newly discovered witness. However, this issue is not preserved for review because defendant failed to renew his motion in the trial court with an affidavit from the witness. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Therefore, our review is limited to whether defendant has demonstrated a plain error that has affected substantial rights, i.e., caused prejudice by affecting the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it trial." *People v Lester*, 232 Mich App 262, 271; 591 NW2d 269 (1998). According to defendant, the new witness saw defendant speaking to a neighbor and then saw him go a friend's house around the time the carjacking occurred. This evidence was cumulative to the trial testimony from both the neighbor and the friend and, therefore, would not make a different result probable on retrial. Further, there is no indication that defendant could not have produced the witness, who was merely another neighbor, with reasonable diligence, prior to trial. Accordingly, defendant has failed to demonstrate error.

Defendant next argues that the trial court erred in admitting evidence of a second lineup involving another suspect where defendant was not present and where the victim failed to make an identification. Again, because defendant failed to object to the admission of this evidence below, we review this unpreserved issue for plain error. *Carines, supra* at 763.

After a thorough review, we find no error. Contrary to defendant's contention, the testimony regarding the second lineup was relevant. Defendant informed the police (and inferentially maintained at trial) that the main subject of the second lineup, Richard White, was the man who actually stole the victim's car. Defendant's claim that White was involved and the victim's inability to identify White – while identifying defendant – had some tendency to make defendant's guilt more probable that it would without the evidence. MRE 401-402; *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909, modified 450 Mich 1212 (1995). Nor was the probative value of the evidence substantially outweighed by the danger of unfair prejudice. MRE 403. Indeed, defense counsel affirmatively used the evidence to argue that the police conducted a second lineup because they doubted the victim's identification of defendant at the first lineup.

In a related argument, defendant argues that he was denied a fair trial because the prosecutor failed to disclose evidence of the second lineup prior to trial. We review this unpreserved constitutional

claim for plain error. *Carines*, *supra* at 763; See *People v Malone*, 193 Mich App 366, 371-372; 483 NW2d 470 (1992), aff'd 445 Mich 369 (1994) (issue that prosecution withheld evidence during discovery is unpreserved unless raised before and addressed by the trial court).

A criminal defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Where, as here, there is no indication that defendant made a discovery request, "material" has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *Stanaway*, *supra* at 666; *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), citing *United States v Agurs*, 427 US 97, 112-113; 96 S Ct 2392; 49 L Ed 2d 342 (1976). In the present case, evidence of the second lineup in which defendant was not a participant and during which no identification was made was not exculpatory. Moreover, because the evidence *was* presented to the jury and the jury convicted defendant, there is no indication that the evidence raised a reasonable doubt regarding defendant's guilt. Accordingly, defendant has failed to demonstrate plain error.

Defendant next contends that his trial counsel was ineffective because she failed to move for a mistrial based on both the admission of the second lineup evidence at trial and the prosecution's failure to disclose the evidence before trial. However, in light of our previous analysis, we conclude that defendant has failed to establish that his counsel's conduct was objectively unreasonable or caused him prejudice. *Stanaway*, *supra*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

As his sixth claim of error, defendant asserts that his convictions for both armed robbery and carjacking violate the constitutional protection against double jeopardy. We disagree. Convictions for both carjacking and armed robbery arising out of a single transaction do not violate the double jeopardy prohibition. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998).

Defendant next claims that prosecutorial comments during rebuttal argument denied him a fair trial. However, defendant did not object to the allegedly improper remarks or request curative instructions. Therefore, appellate review is precluded unless the misconduct was so egregious that no curative instruction could have eliminated the prejudice to defendant or unless manifest injustice would result from the failure to review the alleged misconduct. *Stanaway*, *supra*, 446 Mich 643, 687; 521 NW2d 557 (1994). After a contextual review of the record, we find no impropriety. Moreover, any potential prejudice from the statements was cured by the court's instruction that the attorney's statements were not evidence and that the jurors should only accept statements supported by the evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, manifest injustice will not result from out failure to review the alleged misconduct.

Finally, defendant contends that the trial court's instructions to the jury were flawed because they did not specify that carjacking is a specific intent crime. However, defendant did not object to the jury instructions in question and thus failed to preserve this issue. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In any event, the trial court's instructions were not erroneous

because carjacking is not a specific intent crime. *People v Davenport*, 230 Mich App 577, 579-580; 583 NW2d 919 (1998); *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra